81864-9

NO. 259196

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

RESPONDENT,

V.

GLEN ARTHUR SCHALER

APPELLANT.

BRIEF OF RESPONDENT

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2. Did the trial court properly enter Finding of Fact number six, after reviewing the uncontroverted facts alleged by State at the motion hearing pursuant to *State v. Knapstad*?

3. Did the trial court correctly define "threat" in Jury Instruction Number 10 as defined in WPIC 2.24 and RCW 9A.04.110 (27)?

C. STATEMENT OF THE CASE

1. Facts Presented at Trial

On August 10, 2005, Tonya Heller-Wilson, Director of Crisis Services for Okanogan Behavioral Healthcare, received a telephone call from Glen Schaler. 2/6/07 RP at 237, 241. This call was routed to Ms. Heller-Wilson due to the nature of the call and Ms. Heller-Wilson's experience with crisis intervention. 2/6/07 RP at 241. Ms. Heller-Wilson spoke with Mr. Schaler and observed that he was "crying" and "hysterical" 2/6/07 RP at 241-242. Mr. Schaler advised Ms. Heller-Wilson that he thought he had killed his neighbor and he had a dream that he "slit her throat". 2/6/07 RP at 242. Mr. Schaler stated that he woke up and he was covered in blood. 2/6/07 RP at 242.

While still on the phone with Mr. Schaler, Ms. Heller-Wilson requested that a co-worker dispatch police to the Schaler neighborhood to check on the situation. 2/6/07 RP at 243. Upon receiving this information, Deputy Connie Humphrey of the Okanogan County Sheriff's Office responded to Mr. Schaler's

residence on First Avenue in Malott, Washington at approximately 11:07 a.m. 2/6/07 RP at 205. Deputy Humphrey arrived at the Schaler residence within minutes of receiving the report. 2/6/07 RP at 206.

Upon arriving at the Schaler residence, Deputy Humphrey knocked on the door and a male voice responded, telling her to "go away". 2/6/07 RP at 206. While standing on the porch area of Mr. Schaler's residence, Deputy Humphrey observed what appeared to be blood spatters with some paper towels. 2/6/07 RP at 207. Deputy Humphrey again attempted to make contact with Mr. Schaler by knocking on the door and was again advised by a male voice to "go away." 2/6/07 RP at 207. Deputy Humphrey then asked the male subject if he believed that he had killed his neighbors and his response was, "I dreamed I slit her throat". 2/6/07 RP at 207.

Eventually, Deputy Humphrey was able to get the male subject to open the door to his residence. 2/6/07 RP at 208. Deputy Humphrey was able to determine that the male on the other side of the door was in fact Glen Schaler, whom she had known from prior contacts. 2/6/07 RP at 208. Mr. Schaler opened the door a slightly, handed the phone to Deputy Humphrey, and stated, "Here, you talk to her" or "You talk to them" and then "slammed the door". 2/6/07

RP at 208. Deputy Humphrey then spoke to the person on the other end of the line whom she determined to be Ms. Heller-Wilson. 2/6/07 RP at 209. Ms. Heller-Wilson asked Deputy Humphrey to bring Mr. Schaler to Mid Valley Hospital for an evaluation if Mr. Schaler was not arrested. 2/6/07 RP at 209. Deputy Humphrey then proceeded to the Busbin residence, Mr. Schaler's neighbors, to check on their welfare. 2/6/07 RP at 209. After finding no signs of anyone at the Busbin residence or any evidence of a crime, Deputy Humphrey returned to contact Mr. Schaler at his residence. 2/6/07 RP at 209-210. It was eventually determined that Mr. Busbin was out of town on a jobsite and Ms. Busbin had been seen leaving earlier in the morning to go to work. 2/6/07 RP at 215.

After returning to the Schaler residence, Deputy Humphrey eventually convinced Mr. Schaler to agree to be transported to Mid Valley Hospital for an evaluation by Ms. Heller-Wilson. 2/6/07 RP at 214. Deputy Humphrey transported Mr. Schaler to the hospital and left him with Ms. Heller-Wilson at approximately 12:30 p.m. 2/6/07 RP at 216. After leaving Mr. Schaler, Deputy Humphrey was called back to the hospital to assist on two occasions, once at approximately 1:10 p.m. and again at approximately 4:30 p.m. 2/6/07 RP at 217, 219. During the 4:30 contact with Mr. Schaler,

additional law enforcement personnel were requested to respond due to Mr. Schaler's behavior. 2/6/07 RP at 220. Deputy Humphrey attempted to get Mr. Schaler to comply with the hospital and mental health workers and in response, Mr. Schaler stated, "bring it on because there was going to be a fight, and someone was going to get hurt, he could guarantee, it." 2/6/07 RP at 220. Once additional law enforcement arrived, Mr. Schaler stated, that the "next time he was going to get a bunch of guns and it would be a blood bath." 2/6/07 RP at 220.

Ms. Heller-Wilson remained at the hospital between the time Mr. Schaler was dropped off by Deputy Humphrey, at approximately 12:30 until approximately 5:00 p.m., when Mr. Schaler was transported to Sacred Heart Hospital for further evaluation under the Involuntary Treatment Act. 2/6/07 RP at 246, 263. Ms. Heller-Wilson testified that prior to this incident, she had never worked as a counselor to Mr. Schaler and that her role in working with Mr. Schaler on August 10, 2005 was as a crisis worker with the specific goal of crisis intervention. 2/6/07 RP at 246-247.

During Ms. Heller-Wilson's contact with Mr. Schaler, Mr. Schaler made several statements to Ms. Heller-Wilson about his neighbors, who were later determined to be Kathy Nockels and

Denise Busbin. 2/6/07 RP at 247-251. Ms. Heller-Wilson indicated that Mr. Schaler was "pretty specific that he wanted to kill his neighbors". 2/6/07 RP at 247. Mr. Schaler advised Ms. Heller-Wilson on more than one occasion that he "wanted to kill them with his bare hands, by strangulation". 2/6/07 RP at 248. Mr. Schaler advised that he had been thinking about doing this for "months" now. 2/6/07 RP at 249. Ms. Heller-Wilson attempted in various different ways to determine if Mr. Schaler was serious about the threats and gave Mr. Schaler several opportunities to withdraw the statement, however, Mr. Schaler repeated the threat several times. 2/6/07 RP at 248-250.

Ms. Heller-Wilson testified:

> I can't recall specifically how I asked him. I, I know that you don't, it's part of my job to try to keep people out of the hospital. And when people tell me that they feel like they want somebody to die, or they want to die, I always go into the explanation that you know, there are times that I wish I were dead, but I don't have a plan to kill myself. I mean, you know, there are just times, and there's times that I wish my, my boss didn't exist, but I don't have a plan to kill him. And I kind of went that way, and I said 'You know, sure, you might wish that they weren't there. Maybe your life would be a little bit easier." But he said specifically, he wanted to harm them. 2/6/07 RP at 248-249.

Ms. Heller-Wilson also attempted to give Mr. Schaler some space and a chance to cool down. Ms. Heller-Wilson testified:

> ... I was in and out of the room. Danny Lockwood was sitting with him directly the whole time, and he has to get medical clearance, and they're drawing blood, and doing all this stuff. And so, I'm kind of in and out, you know, giving him some time to chill, to make sure that maybe you know, you know, get some of this energy out of him. And so, yeah, back and forth, trying to say, you know, 'How are you feeling? You doing better now?" And he, he said it several times. 2/6/07 RP at 250.

Ms. Heller-Wilson asked Mr. Schaler why he would want to kill his neighbors, Mr. Schaler advised it was because of a dispute over an apple tree. 2/6/07 RP at 249-250. Ms. Heller-Wilson described Mr. Schaler's demeanor as "angry" when he was communicating the threats. 2/6/07 RP at 251. At no time during Ms. Heller-Wilson's contact with Mr. Schaler did he ever tell her that he wasn't serious about the threats or that he didn't mean what he was saying. 2/6/07 RP at 250. After completing her evaluation, Ms. Heller-Wilson determined that Mr. Schaler was a danger to himself and others and detained Mr. Schaler under the Involuntary Treatment Act. 2/6/07 RP at 255. Ms. Heller-Wilson completed a Petition for Initial Detention which included several of the statements made by Mr. Schaler. 2/6/07 RP at 264. Among those

statements, included, "I have been planning the murder of my neighbor for a few months now. I want to kill her with my bare hands." 2/6/07 RP at 272.

Ms. Heller-Wilson took the threats made by Mr. Schaler seriously and testified that she is required to communicate "viable threats immediately". 2/6/07 RP at 251. Ms. Heller-Wilson then contacted Kathy Nockels and Denise Busbin, Mr. Schaler's neighbors and the subjects of the threats, and advised them of the threats made by Mr. Schaler. 2/6/07 RP at 252-253. Ms. Nockels testified about receiving the telephone call from Ms. Heller-Wilson:

> She told me that this was going to be an upsetting phone call. That I should sit down or prepare myself. That she was calling to inform me of a viable threat that had been made by Mr. Schaler on my life. I broke down. I sat down, I was crying. And I said, 'What are, what are you, what kind of threat are you talking about?' And she said that he threatened to slit my throat and then I really cried. 2/7/07 RP at 24.

Ms. Busbin also testified about receiving this information from Ms. Heller-Wilson and her reaction to it: "I was stunned, I remember feeling like my breath went out of me. I was speechless." Both Ms. Nockels and Ms. Busbin testified that they did feel Mr. Schaler was capable of carrying out the threats. 2/7/07 RP at 24-25 and 45.

Kathy Nockels testified about changes she had to make after Mr. Schaler made these threats:

> We had already put some security lights in the backyard, changed some locks, put chains on the doors, put the, put some new push key locks on our windows. And on the 17th of August, I had to save up the money. So I went and applied for my Concealed Weapons Permit, and got the pamphlet, and found in the pamphlet that I could have a firearm, as long as I was on my own property. So, until I received the Concealed Weapons Permit, and so on the 19th I went and purchased a weapon. And I keep it with me at all times. 2/7/07 RP at 25.

Kathy Nockels and Denise Busbin also testified about several incidents which occurred prior to August 10, 2005, which gave them a reasonable belief that the threats would be carried out. On June 1, 2005, Mr. Schaler came with a chainsaw, cut down the 15 year-old fruit trees that line the property between the residence of Kathy Nockels and Denise Busbin, and raised his chainsaw at Kathy Nockels as she tried to stop him. 2/7/07 RP at 8. Ms. Nockels testified:

> I was, he was still coming down, walking toward me and my position, and I was yelling to stop, stop cutting the trees. 'What are you doing? They are full of fruit. I mean, what, what are you doing?' And he continued down towards me, and walked between the last two trees towards me, raising the chainsaw as he was coming at me. And said, 'Stay out of this. It's none your blank business.' 2/7/07 RP at 11.

After this incident occurred, on the same date, both Ms. Nockels and Ms. Busbin applied for and received a Temporary Anti-Harassment Order out of Okanogan County District Court. 2/7/07 RP at 12. Ms. Busbin testified about how the June 1, 2005 incident caused herself and Ms. Nockels fear:

> Kathy and I developed a system of communication to where we always knew where the other person was. At that time, my husband was working out of town, so I was alone during the week. So, we kept in communication. When I would leave in the morning, I would tell her, call her on the phone, and notify her that I was leaving. And when I came home, I would do thee same. 2/7/07 RP at 41-42.

Two days later, on June 3, 2005, Ms. Nockels reported that Mr. Schaler took photographs of herself, her boyfriend Daniel Salinas, and their residence. "He lifted the camera, looked right at me, and clicked it. And then, gave a weird look, and..." 2/7/07 RP at 15. Ms. Nockels testified about the vantage point of the photograph and the disputed property, where the trees were located, would not have been visible in the photographs taken by Mr. Schaler. 2/7/07 RP at 16.

Ms. Nockels also testified about an incident which occurred on July 23, 2005 where law enforcement was called due to a

dispute between the parties. 2/7/07 RP at 17. Ms. Nockels later, on July 25, 2005, requested and received the police report from Michael Blake of the Okanogan County Sheriff's Office and learned that Mr. Schaler made a statement to Deputy Blake that, "It was obvious that somebody was going to die." 2/7/07 RP at 17-18 and 2/6/07 RP at 288. Deputy Blake testified:

> Yes, I asked him specifically [if] he felt like he was going to kill someone. He told me that when he became angry, he did feel like that he wanted to kill someone, and that that was a natural human response. He did not give me any specifics. I asked him specifics. He did not give me any specifics about 'I want to kill a particular person' or anything, but simply the general statement, 'I feel like, when I get angry, then I want to kill someone, and that that is natural.' 2/6/07 RP at 291.

Deputy Blake apparently did not communicate this information to Ms. Nockels or the Busbins because when questioned further, Mr. Schaler then stated that he thought it was he who would die. 2/6/07 RP at 289.

On the date in question, August 10, 2005, at approximately 6:30 a.m. Denise Busbin called Kathy Nockels to let her know that she was leaving for work and that Ms. Nockels would be the only one home that morning. 2/7/07 RP at 19. They also discussed the

fact that Mr. Schaler was outside at that hour revving the engine to his motorhome. 2/7/07 RP at 19.

Ms. Nockels testified about some observations she made regarding Mr. Schaler that morning. At approximately 8:30 a.m. Ms. Nockels had gone outside to take the garbage cans out and "Mr. Schaler erupted from his front door, and was screaming in foul language at his children to get their garbage out to the curb." 2/7/07 RP at 19. Ms. Nockels testified that Mr. Schaler continued screaming the entire time she was outside and as soon as she turned around and went inside her residence, Mr. Schaler went into his residence. 2/7/07 RP at 19-20.

Ms. Nockels also testified about observations made at approximately 9:00 a.m. when she was outside speaking to another neighbor:

> When I turned around he was holding the door open with one hand, and screaming at the boys that he was going to kill their dog if they did not feed and water it, and throw it in the gully. And he repeated [the] threat to them with foul language at least three times. 2/7/07 RP at 21.

Given the events which transpired within the two months prior to August 10, 2005, the date in question, both Kathy Nockels and Denise Busbin testified that they did take the threats made by

Mr. Schaler very seriously and they felt he was capable of carrying them out. 2/7/07 RP at 24-25, 45.

2. Procedural Facts

On January 18, 2006, Mr. Schaler was charged by Information with two counts of Felony Harassment, RCW 9A.46.020, in Okanogan County District Court for threats made regarding Kathy Nockels and Denise Busbin. CP 1. On August 3, 2006, Mr. Schaler filed motions to suppress evidence, and perhaps most relevant to this appeal, a motion to dismiss pursuant to *State v. Knapstad*. CP 22. A response brief was filed by the State on September 13, 2006. CP 29.

The Court heard argument of counsel on October 31, 2006 and denied the defendant's motions to suppress and dismiss. RP 10/31/06. Findings of Fact and Conclusions of Law were entered and filed on January 10, 2007. CP 89. The defendant was found guilty of both charges after a jury trial which began on February 6, 2006. CP 115-118.

D. ARGUMENT

I. THE EVIDENCE PRESENTED WAS SUFFICIENT TO ESTABLISH A FINDING OF GUILT FOR EACH CHARGE.

A. Standard of Review on Appeal.

The standard of review requires an appellate court to determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wash.2d 333, 339, 851 P.2d 654, 657 (1993); *State v. Luther*, 157 Wash. 2d 63, 77-78, 134 P.3d 205 (2006) [citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) *State v. Aver*, 109 Wn.2d 103, 310-311, 745 P.2d 479 (1987)]. "In determining whether the necessary quantum of evidence exists, it is unnecessary for the reviewing court to be satisfied of guilt beyond a reasonable doubt. It is only necessary for it [the reviewing court] to be satisfied that there is substantial evidence to support the State's case or the particular element in question. *State v. Green*, 94 Wash.2d at 220 [citing *State v. Green*, 91 Wn.2d 431, 588 P.2d 1370 (1979) *State v. Randecker*, 79 Wn.2d 512, 487 P.2d 1295

(1971)]; *State v. Bencivenga*, 137 Wash.2d 703, 706, 974 P.2d 832 (1999).

"When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). When raising an insufficiency claim, the appellant "admits the truth of the State's evidence and all inferences that can reasonably be drawn from it." *State v. Tilton*, 149 Wash.2d 775, 785, 72 P.3d 735, 740 (2003) [citing *State v. Salinas*, 119 Wash.2d at 201; *State v. Alvarez*, 105 Wash.App. 215, 222, 19 P.3d 485 (Div. III, 2001).

In addition, circumstantial evidence is considered no less reliable than direct evidence. *State v. Price*, 127 Wash.App. 193, 202, 110 P.3d 1171, 1175 (Div. II, 2005) [citing *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980) "Furthermore, the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wash.2d at 638. An appellate court also defers to the trier of fact regarding the credibility of witnesses and any conflicting testimony. *State v. Price*, 127

Wash.App. at 202. [citing *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990.

The appellant argues that, even considering the evidence in the light most favorable to the State, the State failed to prove that Mr. Schaler's statements constituted "true threats" and thus, the Appellant argues, the State has failed to satisfy constitutional demands.

B. Mr. Schaler's Statement's Were True Threats and Not Merely a Recitation of a Dream.

"True threats are not protected speech." *State v. J.M.*, 144 Wn.2d 472, 477, 28 P.3d 720 (2001). [citing *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997); *United States v. Kelner*, 534 F.3d 1020, 34 A.L.R. Fed 767 (2d Cir. 1976); *United States v. Howell*, 719 F.2d 1258 (5th Cir. 1983); *United States v. Khorrami*, 895 F.2d 1186 (7th Cir. 1990); *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th cir. 1990); *State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001)]. "The reasons threats of violence are outside the First Amendment are the protection of individuals from the fear of violence, from the disruption that fear endangers, and from the possibility that the threatened violence will occur." *Id.* at 478 [citing

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 387-88, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)

"A 'true threat' is a statement made 'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of [another individual].'" *Id.* [quoting *State v. Knowles*, 91 Wn. App. 367, 373, 957 P.2d 797 (1998) (quoting *Khorrami*, 895 F.2d at 1192)]. The appellant argues that the State failed to prove that Mr. Schaler's statements were true threats because "a nightmare does not constitute a true threat." Brief of Appellant, page 9.

This case was initiated after Mr. Schaler reported that he had a dream. Mr. Schaler advised Ms. Heller-Wilson that he thought he had killed his neighbor and he had a dream that he "slit her throat" and that such thoughts had been occupying a lot of his daytime as well. 2/6/07 RP at 242. Mr. Schaler stated that he woke up and he was covered in blood. 2/6/07 RP at 242. The appellant, however, completely ignores the remainder of the trial record and assumes that the "nightmare" or the dream alone that was reported by Mr. Schaler was the sole basis for the charges filed here.

The defendant's statements made on August 10, 2005, however, went well beyond a mere recitation of a dream. After Mr. Schaler was taken to Mid Valley Hospital in Omak, Washington, he was observed by Ms. Heller-Wilson for approximately four hours. 2/6/07 RP at 246, 263. During that time he repeatedly made threats to kill both Kathy Nockels and Denise Busbin. Mr. Schaler stated that he "wanted to kill them with his bare hands, by strangulation". 2/6/07 RP at 248. Mr. Schaler advised that he had been thinking about doing this for "months" now. 2/6/07 RP at 249. Although Ms. Heller-Wilson made several attempts to determine if Mr. Schaler was serious about these threats, Mr. Schaler continued to repeat such threats. 2/6/07 RP at 248-50.

Mr. Schaler's demeanor when making such threats was described by Ms. Heller-Wilson, as "angry". 2/6/07 RP at 251. When asked why he would want to kill his neighbors he stated that it was over a dispute over an apple tree. 2/6/07 RP at 249-250. This is consistent with Kathy Nockels' testimony regarding the June 1, 2005 incident regarding the fruit trees where he raised the chainsaw at Ms. Nockels as he "came at [her]", which just preceded the August 10, 2005 incident in question. 2/7/07 RP at 11.

Based on her observations of Mr. Schaler and her training and experience in crisis intervention, Ms. Heller-Wilson, determined that Mr. Schaler presented not only a risk to himself but to others, specifically, Ms. Nockels, and Ms. Busbin. 2/6/07 RP at 251. Ms. Heller-Wilson indicated that she is required to communicate "viable threats" and did report them to the subjects of the threats who took such threats very seriously. 2/7/07 RP at 24, 45. Both Ms. Busbin and Ms. Nockels testified about prior incidents with Mr. Schaler and how their lifestyles changed as a result of their fears of Mr. Schaler. 2/7/07 RP at 12, 25, and 41-42.

The facts presented in this case, are in stark contrast to the facts presented in *State v. Kilburn*, authority repeatedly cited by the appellant. In *State v. Kilburn*, Mr. Kilburn was convicted of felony harassment based on a statement made to a female classmate that he had planned to bring a gun to school and shoot everyone in the class. This statement, however, was made to another student, whom the defendant had been friendly with in the past and had often joked with. The defendant had also been laughing or giggling when he made the statement. *State v. Kilburn*, 151 Wn.2d 36, 84 P.3d 1215 (2004). Perhaps, most importantly, the student to whom this threat was communicated stated, "yeah right," and turned away

at the time Mr. Kilburn made such statements to her. It wasn't until later that evening after thinking about the statement some more that this student thought Mr. Kilburn might be serious and she told her mother and father. *State v. Kilburn*, 151 Wn.2d at 39.

Unlike *Kilburn*, the immediate receiver of the threats in Mr. Schaler's case, Ms. Heller-Wilson, did take steps to ensure whether or not Mr. Schaler was in fact serious about such threats and determined the threats to be "viable." 2/6/07 RP at 251. There wasn't any evidence presented at trial which would suggest that any of the parties ever thought that Mr. Schaler was joking, like in the *Kilburn* case. Mr. Schaler not only repeated these statements several times but he also stated that he had been thinking about killing his neighbors for months. It is clear from the evidence presented, and given the history between Mr. Schaler and the victims prior to this incident, that such circumstances were presented in which a reasonable person would foresee that Mr. Schaler's statements would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another.

C. The Trial Court Committed no Error in Denying the Defendant's Motions to Dismiss.

Because Mr. Schaler's statements were "true threats", the trial court was correct in denying the defendant's pre-trial motions to dismiss on October 31, 2006 and during the trial on February 7, 2007. The State met its burden at trial and proved all elements of RCW 9A.46.020

RCW 9A.46.020 provides:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out; and

(2)(b) A person who harasses another is guilty of a class C felony if (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person. RCW 9A.46.020

Although several Washington courts have reviewed whether or not a threat constitutes a "true threat" under the rule of independent appellate review, following *Kilburn*, there appears to be no authority which would suggest that "true threat" is required to be proven as an actual element of the offense.

In *State v. E.J.Y.*, the Court of Appeals Division I, held that the elements of RCW 9A.46.020 proscribe only true threats:

> *E.J.Y* was adjudicated guilty in juvenile court of felony harassment based on threatening statements he made to a school employee. *E.J.Y.'s* principal argument on appeal is that the criminal harassment statute, RCW 9A.46.020, is unconstitutionally overbroad and vague under both the federal and state constitutions. We disagree because the statute as written proscribes only true threats, which are unprotected speech. *State v. E.J.Y*, 113 Wn. App. 940, 943, 55 P.3d 673 (2002).

Here, in viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements were proved beyond a reasonable doubt. In fact, both the trial court and the jury concluded there was sufficient evidence to convict.

II. THE TRIAL COURT DID NOT ERR IN ENTERING FINDING OF FACT NUMBER SIX.

A. Finding of Fact Number Six is Supported by Substantial Evidence Presented at the Hearing on October 31, 2006.

The appellant argues that the trial court entered a finding of fact that was not supported by the evidence. The appellant argues, "The court found, in pertinent part, 'Mr. Schaler threatened to slit the throats of both Ms. Busbin and Ms. Nockels.'" Brief of Appellant, page 13. The appellant, however, cites to CP at 110-114. This, however, appears to be in error as this citation references jury instructions, an amended information, and an exhibit list. The Findings of Fact and Conclusions of Law, filed on January 10, 2007, is listed as CP 89. It appears that the appellant is referencing this document as such finding does appear as Finding of Fact number six.

On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. *State v. Vickers*, 148 Wn.2d 91, 116; 59 P.3d 58 (2002). The party challenging a finding of fact bears the burden of demonstrating the

finding is not supported by substantial evidence. *Id.* Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* Here, there was substantial evidence in the record to support Finding of Fact number six.

B. The Appellant Improperly Cites the Trial Record to Support the Argument that the Court's Written Finding is not Supported by the Evidence.

Again, the appellant appears to be challenging a finding of fact which was filed on January 10, 2007, entered as a finding from a motion hearing held on October 31, 2006. The appellant, however, in claiming that the evidence presented did not support such finding of fact, cites to the trial record and cites to trial testimony not taken on February 6, 2007, by citing 2/6/07 RP at 267-268. Brief of Appellant, page 13.

In addition, the appellant argues, "The trial court's written finding erroneously characterized what was actually presented on the record and disregarded witness testimony. Given that, these findings cannot be upheld on appeal." Brief of Appellant, page 13. The challenged finding, however, was entered after a *Knapstad* motion hearing pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729

P.2d 48 (1986), and thus, there was no testimony taken at the motion hearing held on October 31, 2006. RP 10/31/06.

Under *Knapstad*, dismissal is proper only where uncontroverted facts alleged by State, if true, would not prove the charge. (i.e. there are no material disputed facts, and the undisputed facts do not establish a prima facie case). *Id.* If there are no material disputed facts, the court is to determine whether facts which State relies, establish as a matter of law, prima facie case of guilt. *Id.* The motion to dismiss should be granted only where the construction most favorable to the State would not establish a prima facie case of guilt. *State v. Knapstad*, 107 Wn.2d at 356 [citing *State v. Pettis*, 397 So.2d 1150 Fla.Dist.Ct.App.1981)].

Where material disputed facts exist, denial of the motion to dismiss is mandatory.

> A Washington defendant should initiate the motion by sworn affidavit, alleging there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. The affidavit must necessarily contain with specificity all facts and law relied upon in justification of the dismissal. Unless specifically denied, the factual matters alleged in the motion are deemed admitted. The State can defeat the motion by filing an affidavit which specifically denies the material facts alleged in the defendant's affidavit. If material factual allegations in the motion are denied or disputed by the State, denial of the motion to dismiss is mandatory. *State v. Knapstad*, 107 Wn.2d at 356

The facts alleged by the State at the motion hearing included: all facts contained within the August 10, 2005 police report of Deputy Connie Humphrey and the corresponding statements of Kathy Nockels and Denise Busbin. All documents were attached to the State's response to the defendant's motion pursuant to *Knapstad*. CP 29.

Page four of Deputy Connie Humphrey's police report provides:

> Heller requested phone numbers for Denise Busbin and Kathy Nockels. Heller told me that Schaler stated to her that he was going to slit their (Denise Busbin and Kathy Nockels) throats, Heller explained that she was mandated by law to advise those individuals of the threats made. I provided Heller the phone numbers from our RMS data base for those individuals. CP 29.

In addition, the statements of Kathy Nockels and Denise Busbin explain that Ms. Heller-Wilson did phone both and advised them that Mr. Schaler had made a threat to kill them. CP 29. Their statements also provide their reactions to learning this information and how they each took the threat very seriously. CP 29.

Thus, in considering all facts provided in the police report of Connie Humphrey, the statements of both Ms. Nockels and Ms.

Busbin, and the standards set forth by *Knapstad*, it is clear that Finding of Fact number six is supported by substantial evidence which was found in the record from the *Knapstad* motion heard on October 31, 2006.

III. THE TRIAL COURT DID NOT ERR IN FAILING TO PROVIDE A "TRUE THREAT" DEFINITION INSTRUCTION.

The appellant argues, for the first time on appeal, that the trial court erred in instructing the jury that, "threat means to communicate, directly or indirectly, the intent to cause bodily injury immediately or in the future to the person threatened or to any other person" as found in WPIC 2.24 and RCW 9A.04.110 (27). The appellant argues instead, that the trial court should have instructed on the definition of "true threat." Brief of Appellant, page 15 and CP 114 (Jury Instruction 10).

The proper approach for analyzing alleged constitutional error raised for the first time on appeal involves four steps. *State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992).

> First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical

> and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis. *Id.*

The Court in *State v. Lynn* stressed the importance of this analysis on appeal.

> Prohibiting all constitutional errors from being presented for the first time on appeal would denigrate our constitutional protections and result in unjust imprisonment. On the other hand, permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts. A judicious application of the 'manifest' standard permits a reasonable method of balancing these competing values. Thus, it is important that 'manifest' be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals. *Id.*

In determining whether the alleged error is manifest, the appellant "must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* This requires a showing of a "likelihood of actual prejudice." *Id.* at 346; *State v. McNeal*, 145 Wn.2d 352, 37 P.3d 280 (2002). Although several Washington courts have reviewed whether or not

a threat constitutes a "true threat" under the rule of independent appellate review, following *Kilburn*, there appears to be no authority which would suggest that "true threat" is required to be proven as an actual element of the offense, requiring the State to instruct the jury on such language. "The constitutional requirement is only that the jury be instructed as to each element of the offense charged." *State v. Scott*, 110 Wn.2d 682, 689, 757 P.2d 492 (1988) [citing *State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845 (1953.

Here, the jury was instructed regarding each and every element including language which mirrored RCW 9A.46.020 and properly defined "threat" pursuant to RCW 9A.04.110 (27) and WPIC 2.24. CP 114. Thus, the appellant has not demonstrated a likelihood of actual prejudice and a showing that the trial court's failure to instruct regarding the definition of "true threat" constituted manifest error.

Even if this Court were to find that the trial court's failure to instruct constituted a manifest error and thus the jury in this case should have been instructed based on the definition of "true threat", the Court is required to undertake a harmless error analysis. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). "A constitutional error is harmless if the appellate court is convinced

beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Kirkman*, 126 Wn. App. 97, 107, 107 P.3d 133 (2005) [citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985

Although the Court did not specifically instruct on the definition of "true threat" the Court did provide one of Mr. Schaler's proposed instructions, in Jury Instruction Number 12. Such instruction read, "A person threatens 'knowingly' when the person subjectively intents to communicate a threat." CP 114 (Jury Instruction 12). In *State v. Kilburn*, the Court explained that the focus is on the speaker and for the purposes of appellate review, the "relevant constitutional question under the circumstances here is whether there is sufficient evidence that a reasonable person in [the defendant's] position would foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death." *State v. Kilburn*, 151 Wn.2d at 48. Thus, in looking at the definition of "knowingly", one of the elements of the offense, the jury was required to focus on the speaker, Mr. Schaler, and find that he not only would foresee his comments would be interpreted as a serious statement of intent to inflict serious bodily

injury or death, but that he actually intended to communicate a threat to the victims.

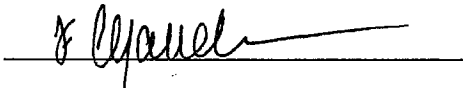
Here, a reasonable jury would have reached the same result if instructed on the definition of "true threat" given all of the evidence, the jury instructions, and testimony presented at trial which established that Mr. Schaler's statements went well beyond a recitation of a dream and did constitute true threats to kill both Kathy Nockels and Denise Busbin.

E. CONCLUSION

The Court of Appeals should affirm the decision of the trial court and the jury finding that defendant was guilty of the crimes of felony harassment.

Dated this 21st day of December, 2007

Respectfully Submitted by:



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